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IN THE

Supreme Court of the United States.

THE WM. CRAMP & SONS SHIP AND ENGINE BUILDING CO., *Appellant*,

vs.

THE UNITED STATES, *Appellee*,

and

THE UNITED STATES, *Appellant*,

vs.

THE WM. CRAMP & SONS SHIP AND ENGINE BUILDING CO., *Appellee*.

Nos. 263 and 264

Reply Brief of the Cramp Company.

JOHN C. FAY,
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EPPA HUNTON,
HOLMES CONRAD,
EATON CREECY,
Of Counsel.

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REPLY BRIEF OF THE CRAMP COMPANY.

Whenever the record is at variance with the contentions of the Attorney General he seeks to smooth out his difficulties by suggesting that the findings "might have been better expressed" (Reply Brief, p. 2), or they are "not quite as full as might be desired" (p. 15), or "the court did not think it necessary" (p. 11); and when there is nothing in the record at all he supplies it by assertions, "that the Cramp Company never contended

it was anything else" (p. 2), or there was "no redoubt armor on the ship" (p. 13), and like expressions. We have not thought it necessary to go over each of these expressions in detail, but do not for that reason concede that he is correct in the assertion not specifically denied. We assume that the case is to be tried on its record unaided by the outside declarations of counsel. Following the course of the brief we take up in the order—

First.—The effect of the extension of time.

Second.—The effect of the final release.

Third.—Wharfage.

Fourth.—Insurance.

Fifth.—Preparation for trial trip.

Sixth.—Release of May 10, 1894.

First.—Extension of Time.

The Attorney General on page two of his reply brief gives only an extract from Finding IV. The full finding gives the reason assigned by the Secretary for extending the time, to wit, "*to thereby release the claimant from penalties.*" That is what the Secretary thought he was doing. He never dreamed he was discharging the United States from any legal liability it had incurred. The whole finding reads as follows:

> On December 4, 1895, and after the completion and delivery of the vessel at the time hereinafter stated, the Secretary of the Navy decided that the cause of delay for the period of two years in the completion of the vessel was due to the failure of the United States to furnish the claimant the ma-

terials contracted to be furnished by them within the time and in the order to properly carry on the work; and for that reason the time within which to complete the vessel, *and thereby release the claimant from the penalties provided for in the 19th paragraph of the contract, was on said date extended* by the Secretary of the Navy a corresponding length of time, to wit, to November 19, 1895, on which latter date the vessel so contracted for was completed and delivered.

He further contends that the extension of time could not be made till after the delay had ended. If he had noticed that the penalties for delay were to be deducted from the instalments as they became due, Article IX of Contract (Rec., p. 9 last line, p. 10 first line) "All such deductions from the contract price of the vessel to be made from time to time from any payment or payments falling due under this contract," he would have seen that every time a payment was made after November 19, 1893, it was the duty of the Secretary to decide whether a deduction should be made from such payment, and that extensions of time were to be made in advance, not to await the final completion and acceptance of the vessel. The findings do not show the date of the partial payments, but we do not think it will be disputed that several were made after the expiration of the contract period. We cannot conceive what advantage it was to the company to have the time extended, if the Attorney General's construction of the contract is correct, for if the Secretary did extend the time he would inflict upon the company a grievous wrong.

We are unable to understand what the learned counsel means on p. 5, reply brief, that "it is a matter of common knowledge that it (the armor) could not be manufactured rapidly." "Rapidly" is a relative term. If he means that it was a matter of common knowledge that it could not be manufactured within less than two years; then that common knowledge was denied to both the Navy Department and the Cramp Company, for while it could not be begun till ten months after the date of the contract and was to be delivered in time to be put on and a trial of the vessel had in twenty-six months thereafter, they both not only thought but agreed that it should be done; nor is it quite true, as stated on p. 37 of the original brief, that "it was a matter of common knowledge that much of it was of a kind that had never been made in the United States before," precisely the same kind of armor had been made before, the only difference was that this armor was *thicker* than that on the armored cruisers; they had side belts, casemates, barbettes, and turrets.

As there was no one to whom a claim for damages and delays could be presented, it is quite immaterial (as the reply brief, p. 6, claims) that no such claim had been presented up to May 10, 1894. On p. 7, reply brief asserts that in December, 1896, the contractors having undertaken to "dispute the effect of the extension," a judicial decision became necessary. This is wholly unwarranted. Such a construction was never claimed by any one, up to the filing of Mr. Binney's brief in the Court of Claims. The Navy Department

under the authority of Congress, had audited and Congress had paid every such claim. The Department of Justice had not set up any such defense in the Pneumatic Gun Carriage case (*supra*), and both the Navy Department and the Department of Justice had acquiesced in the decision of the Court of Claims. There were but four claimants under the class of claims. The Cramps, the Richmond Locomotive Works, Palmer & Co., and the Pneumatic Gun Carriage Co. Everyone except the Cramp Company have been paid for the damages caused by the delays, two upon the recommendation and audit by the Navy Department, and one by the Court of Claims, as will appear by public documents printed in an appendix to this brief. The Union Iron Works who built the Oregon were paid as the work progressed during the building of that vessel, so that both by the Executive, Judicial and Legislative Departments the validity of these claims have been acknowledged, and it is an entirely new defense that has been set up against the Cramp Company.

Second.—Effect of Final Release.

While the reply brief (p. 9) now admits that the Secretary had no power to pay unliquidated claims for damages for delay, and that it might therefore prevent him from obtaining a release for such damages, still it is claimed that because the contract provided for a release that it can be construed to embrace such a claim. That is not only a *non sequitur* but utterly illogical. These damages were no part of the cost of the construction of the vessel, while

the delay undoubtedly made it cost the Cramp Company more by reason of the disarrangement of their working programme, they are not allowed anything for that nor are they allowed anything for the additional premium on their bond. As already shown, this release only related to the contract price, it did not affect the extra work, the speed premiums, nor the changes of plans; they were to be settled for separately.

Third.—Wharfage.

It is not a fact that the Cumberland Basis which was dredged out to accommodate the Indiana was a part of the yard. The yard, its shops and machinery were used to store material, and prepare the armor to go on the vessel; much work had to be done to a plate of armor after it was delivered before it could be put on to the vessel; the bolts had to be fitted and the joints had to be trimmed; when delivered it was only finished "within reasonable manufacturing limits;" all this took up space in the yard and in the company's shops, and when it was ready to be put on the vessel, the vessel was towed up to the slip on which was the railroad that carried these huge pieces of armor to the water's edge. The upkeep of the yard was the repair of its shops and buildings and policing it. The court, in its allowance for wharfage, embraced the dredging, tug service and watchman.

Fourth.—Insurance.

The reply brief makes no mention of the subject of insurance.

Fifth.—Preparation for Trial Trip.

The suggestion in the reply brief for the United States that the contention of the Cramp Company that their offer of the Indiana of March 23, 1894, for trial between May 1st and 10th, 1894, was not an offer under Article III, is not warranted by the facts, and is specifically contradicted by the court's XIIth finding, R., p. 22. The court there finds that on "March 23, 1894, the claimant notified the Secretary of the Navy that the vessel, *other than the fitting of the armor*, had reached a stage of completion ready for an official trial, and proposed to offer said vessel therefor between May 1 and 10 following." As the only provision for the trial without armor was under Article III, the learned counsel must have entirely overlooked finding XII when he made that statement.

He also fails to realize that this armor was to be delivered in the "order" to carry on the work properly; that order is specified in the contract as *first*, the side belt, *second*, casement, *third*, turrets (there were six of these), *fourth*, redoubts (there were two of these), *fifth*, barbettes (there were four of these), and *sixth*, conning tower. *No other armor was involved, except these six classes of armor.* The United States was to furnish quite a variety of other armor, but the ship could be made seaworthy and be subject to a trial trip without any or either of these six classes, just as the seven previous vessels had been, and while this armor was part of her hull, it was not a structural part of the vessel. It was merely additional weight attached to and made part of

her hull, and this weight could be as well represented by pig lead properly distributed as armor. If all the armor was on and a trial took place under Article X the vessel to be "weighted to a mean draught of 24 feet" (line 20, p. 11, Record), and even on a final trial it had to be "weighted correspondingly" (line 22, p. 12, Record). It was neither new or unusual for a vessel to be weighted for a trial trip; in fact, it had been the usual custom to do so. To use a homely illustration, by comparing a ship with a house, the location of the armor might be described as if the *side belt* were the basement, and first story, *casement*, second and third stories, *turrets*, in the attic extending through the roof, and the *redoubts*, *barbettes* surrounding the turrets, and the *conning tower* on the roof.

The side belt extended from four feet below the water line to the protective deck; the casement, from the protective deck passing the berth deck to the main deck; the turrets, from the foundation just below the upper deck to above the deck, and the redoubt, barbette surrounding the turrets and the conning tower resting on the upper deck.

Another cogent reason why this order should be observed was the fact that the side belt was four feet below the water line at normal draft, and if this other heavy weight of armor was placed on her decks, it would sink here so deep in the water that the side belt could not be put on at all. There was no dry dock in the United States that could dock her with this weight on.

The learned counsel is mistaken on p. 13 of his reply

brief and p. 2 of his original brief in the statement that there was "*no redoubt armor.*" Both the contract and specifications required it and the vessel was so built. He has fallen into this error by not being advised what the armor was. It is denominated in the specifications as "redoubt," and served the same protection to these 13-inch turrets as the *barbette* armor served to the so-called 8-inch turrets. The designation of 8-inch and 13-inch turrets is very misleading, for this dimension has no relation either to the thickness of the armor or the size of the turrets, but relates solely to the caliber of the guns they contained. The 13-inch turrets carried two guns each of 13-inch caliber and the 8-inch turrets carried two guns each of 8-inch caliber and the thickness of their armor was 17 inches and 10 inches, respectively—and their inside diameter of approximately 35 and 20 feet, respectively; the redoubts and barbette armor was 17 inches and 10 inches, respectively. (See extract from specification, Appendix.) In the same way the protection for the gun shields are denominated "Sponson" armor in Finding III, and the learned counsel could as well say that the gun shields and armor protection for the guns was omitted as to say that there was no redoubt armor on the vessel because he does not find that particular expression in that finding.

On page 13 of reply brief the learned counsel is reluctant to admit that the mere perfunctory delivery of a small piece of armor which was not followed up with reasonable diligence would even technically fulfill the intent of the paragraph, although he candidly admits it

on p. 27 of his original brief, but destroys even this reluctant admission by boldly asserting there was "no unreasonable delay."

If not to even commence to deliver the side belt armor, the first required, until nearly ten months after the contract term expired, and not to finish its delivery for twenty-two months after its expiration, and waiting nearly eleven months after the casement armor was furnished before even beginning the side belt, does not constitute "unreasonable delay," we would like to be instructed as to how many years must elapse before delay can become unreasonable. He asserts that the findings do not state that this is inconsistent with "due diligence." Inasmuch as the court below rendered a judgment against the United States, it is very clear that the conclusion they reached was that these delays were not only unnecessary, but inexcusable.

Further, on pages 13 and 14, counsel is driven to maintain his argument to assume the absurd position that while the contract really means that a trial might take place without any armor on the vessel at all, it could not possibly mean that a trial could be had with any portion of it on; that is to say that the nearer a vessel is completed the less desirable it is to test her; and the more pig lead you put on her to compensate for the absence of armor the better it is. To give such a construction to that language violates every rule of common sense. The next paragraph accords with the construction that the Cramp Company has always contended for, to-wit: If at the time the

company had proceeded with the building of the vessel so far that it could not reasonably progress further without armor, which was the case in March, 1894. The United States candidly admits (reply brief, p. 15) "If *at that date* the Government had not *commenced* to deliver the armor for her side belt * * * "then the contractor was entitled to a trial trip." This is exactly what the Cramp Company claim, and the findings conclusively show (Finding III, p. 18) that on the 24th day of March, 1894, the United States had not even commenced to furnish the armor for the *side belt*, and we agree with the statement that the company was then entitled to a trial, but it was refused us. Whenever the counsel draws upon the contract our contentions are perfectly clear; it is only when he draws on his imagination that the issue is at all befogged. It is to be observed that this concession is drawn from a citation from the contract, but in the next paragraph he reaches a conclusion at war with the contract by interpolating the words, "*or any of the armor specified;*" this has no foundation in the contract and exists only by a draft upon his imagination. There are no words in the contract that justify the interpolation of the words *or any part of either of said classes of armor*, and without them the whole argument of the United States falls to the ground. The argument is that if an armor bolt or even a rivet had been furnished, the United States was at liberty to refuse a trial trip. The learned counsel seems to think the United States had no interest in the trial. Here was a pioneer vessel that was to defend the honor of our flag, to encounter the great war vessels of

other nations; it was the product of American genius; vast sums of public money had been voted to carry out the project; three were under construction and the country was anxious to see if it would meet the predictions of its designers; and yet the learned Attorney General calmly argues that the Navy Department had inserted in the contract some trick language by which he could indefinitely postpone the demonstration of its success. At the time that contract was made, the United States, as well as the Cramps, was eager to know and at the earliest possible moment whether a vessel of this weight would make the contract speed, and Article III was to accelerate, not to impede, an early trial; it was of the greatest importance to the United States as well as for the benefit of the contractors. The provision as to furnishing this armor was in good faith, and it meant just what it said; there was not lurking in the covenant any premeditated reservation, which, in the exercise of bad faith, a delivery of an "armor bolt" would do away with the whole purpose of the article. The language of the contract does not justify it, and to interpolate such words into it, would convert it into a covenant of bad faith.

The reply brief, p. 16, not only argues without facts but against facts, for while Finding XII (Rec.) directly shows that the Secretary first brought the subject of preliminary trial, and appointed a board of two experts to supervise the trial preparations, the brief insists "that it must not be inferred that the Secretary originated the idea of such a trip, but, on the contrary, that the company must itself

have brought the matter up at an earlier date." He further insists that such a trial would be a "departure from the terms of the contract." It was certainly not a departure from the terms of article III of the contract, as the contract was understood by both the contractors and the Department, and again he says (p. 17), "the Secretary might have appointed the board of officers six weeks sooner, *when the Cramp Company first brought the matter up.*" He did appoint a board of officers on March 6th, 1894, to supervise the trial trip preparations, when he himself first brought the matter up, and who put the vessel in condition for her trial trip. The second board did not pass upon her readiness for a trial trip under article III, nor did he.

Again he asserts (p. 18) "that as the proposed trial would be *useless*, the claimant ought not to have suggested it." "It does not appear that the Secretary was at all aware how useless it would be until after the board had reported." There is not a word in the record to justify the assertion that such a trial trip would be *useless*, nor did any board ever so report. It would have been silly for the Cramp Company to offer a vessel for a useless trial. The trial was to test the hull, machinery and speed, and if these did not come up to contract requirements, the Cramps were to pay the cost of the preparation and the cost of the trip and get no payments. The vessel was in better condition to test than it would be with *no armor at all on*, and as the learned counsel concedes that the contract does provide for such a trial trip, he is by this assertion forced into dilemma of charging both the Sec-

retary of the Navy as well as the contractors with solemnly providing in Article III for a *useless trial trip.* As seven previous vessels had been subjected to trial trips under the same conditions, none of which had proved *useless,* it would seem to be rather a wild flight of imagination.

Again he insists that the Cramps ought to have applied for a board to ascertain whether a trial would be "useful or not." If that was in accordance with the rules and regulations of the Navy Department, he is confronted with the fact that at least seven boards had already passed on that subject in the seven previous vessels, and one prepared this vessel for such a trial, while the other one in this case made no report on the subject whatever. They reported the vessel was not finished, which everybody knew, and that in the interest of the United States a trial should not take place until the vessel was fully completed and ready for delivery. They either did not approve of Article III or did not know anything about it, at any rate they did not report on it.

On p. 18 he insists that "the contract did not provide for a trial trip until the vessel was completed and ready for delivery," while on page 12 he inserts extract from the contract that provides for the very trial trip we asked for, and on p. 14 admits we were entitled to it. The cost of preparation was directly due to the delay; it grew out of the default of the United States in delivering armor; it is not founded on the Secretary's letter of March 9th. It was not in the nature of a new

promise, nor did it arise from an error of judgment of the Secretary, or upon a promise that the Secretary was not authorized to make. The case of Lee & Monroe, Whiteside *vs.* U. S. or Floyd Acceptances cases have no bearing on the question. It is respectfully submitted that the Court of Claims erred in holding the rule announced in those cases applicable to the cases at the bar. Their error was caused by entirely overlooking Article III of the contract which seemed to be utterly ignored.

Sixth.—Release of May 10, 1894.

The reply brief of the United States claims that the payment of twenty-three of the twenty-seven of the retained percentages seven months, *i. e.* (June 20, 1894), after the expiration of the contract period, was not then *legally due.* The court, however, finds as a fact that if it had not been for the default of the United States, not only these twenty-three percentages, but the whole contract price would have been paid to the Cramp Company by November 19, 1893. Instead of not being legally due, they were actually in default for over seven months.

The illustration on p. 24, reply brief, is not at all either apt or applicable. When money is borrowed it is usual to give obligations for its repayment, but it is not usual when paying a debt to take an obligation to return it on demand.

The findings do not show how much of the 28th, 29th, or 30th installments had been earned up to June 10, 1894, for the reason that until the 30th payment had

been earned it was useless to ascertain whether any one of the others had. The three payments really constituted one payment only, payable altogether, so it is not proper to assume that none of this work had been done because no estimate had been made. In fact, in view of Articles XII (Rec., p. 13), which authorized the Secretary to forfeit the contract if satisfactory progress was not being made at any stage of the work, would tend to show that the work was progressing, so far as the contractors were concerned, with satisfactory speed.

The reply brief (p. 27) abandons the Government's previous contention that an executive officer had power to settle claims for unliquidated claims, and now concedes that he has no authority of jurisdiction to settle or adjust them, but notwithstanding he may require and compel the release of such a claim; in other words, he cannot compromise it or pay it but he can discharge it by demanding its release.

No executive officer has any power or authority to pay any claim that the law does not authorize him to do, nor to pay anything more than what the United States justly owes and what the claimant has a just right to receive, and he has no power or jurisdiction to attach to that act any condition other than the discharge of that particular claim. If he could, then under the guise of obtaining a "release for damages," pay ten times the amount due. It would invite and protect the grossest kinds of fraud. The Secretary had no jurisdiction to deal with the question at all; no case is cited to establish the doctrine that an unauthorized officer may secure a

release which shall inure to the benefit of the United States, while a number of cases hold that in order to make a compromise effective it must be had with an officer clothed with authority to adjust the claim. (Comstock's case and cases cited, *supra.*)

The reply brief complains that the Court of Claims did not specifically find that the withholding of upwards of $700,000 as itemized on p of our original brief affected the finances of the company, and the assertion that it did is simple assumption. We confidently contend that it is a matter of common knowledge that this court will take judicial notice of that the withholding of such a vast sum of money from a ship building company in times of panic and with its army of workmen to pay off weekly, of necessity could not fail to produce financial distress.

The court will take judicial notice that at the time that even the financial condition of the United States was affected. Its gold reserve had fallen below its legal standard, and the United States was issuing bonds; there was a deficit in her Treasury, and although on May 10 she agreed to pay the Cramp Company its retained percentage, it was not until June 20, *forty days later,* was she able to meet her obligation.

In conclusion, the Cramp Company call attention to this fact that the judgment when amended as prayed in the cross appeal will *only partly reimburse* the company for ACTUAL CASH OUTLAY, OF MORE THAN TWELVE YEARS AGO. Not a cent of profit, nor of interest, nor for additional cost to them by the interruption of the work, or

additional premium on their bond, nor for the costs and expense of the long, expensive and protracted litigation. This meager amount is all that can now be recovered. When the splendid service performed by this magnificent vessel in the defending the honor of our country, the glory of our flag, and the prowess of our Navy at Santiago, it should bring the blush of shame to the cheek of every patriotic citizen to know that now after twelve years the reimbursement of the builder is not only unpaid, but its repayment is resisted by unreasonable, unconcernible and highly technical defenses.

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APPENDIX.

[*Extract from page 6 of Specifications.*]

Armor-Plating.

Side-Belt.—To be furnished by the Navy Department and worked as shown on the plans, extending from 3 feet above the normal load water line to 4 feet 6 inches below the normal load water line amidships, diminishing to about 4 feet 2½ inches below the load water at the ends, the outside surface to conform to the shape of the vessel with a thickness of 18 inches extending from the top of armor to 12 inches below the load water line, from which point it will taper to 8 inches in thickness at the top of armor shelf. * * *

Diagonal Armor.—This will be 14 inches thick and will be worked, as shown on the plans. * * *

Casemate Armor above Belt.—This will be worked as shown, 5 inches thick in all, made up of two ½-inch plates and one 4-inch plate. * * *

Turret Armor.—For the 13-inch guns to be 17 inches thick, and be worked as shown on the plans; the sizes of plates to be held to, as shown, if possible. * * *

Redoubt Armor.—This armor will be 17 inches thick, and the plates will be worked in one piece the whole depth of about 12 feet. * * *

Armor for 8-inch Barbettes and Turrets.—The barbette armor is 10 inches on the outer sides and 8 inches on the inboard sides, as shown on the detail plans. * * *

Armored Protection for 6-inch Guns.—To be shaped as shown on the plans. To be five inches thick, the upper and lower edges to be secured to the plating of the decks.

* * *

Armored Protection for the 6-pounder Gun on Main Deck.—To be shaped as shown on plans, two inches thick. * * *

Armored Protection for 1-pounders at the ends of the Vessel.—These guns will have the plating thickened to a total thickness of 2 inches in wake of the ports to act as a shield.

Statement of the Action Taken by the Executive, Legislative, and Judicial Department of the Government in the Cases of Claims Arising out of the Delays in Furnishing the Armor Plate to Contractors with the Navy Department.

There were four contractors with the Navy Department who made claims for damages arising out of the Department's failure to furnish armor according to the contract, namely: The Richmond Locomotive Works, The N. F. Palmer, Jr., & Co., The Pneumatic Gun-Carriage Co., of West Virginia, and the Cramp Shipbuilding Co., of Phila., Pa.

The Cramp Company presented its claims to Congress and asked for payment. Similar claims were presented by the N. F. Palmer, Jr., & Co., and the Richmond Locomotive Works, to Congress. Congress thereupon passed the act of June 30, 1897, cited in Appendix to original brief.

Soon after the date of this letter the Cramp Company entered this suit in the Court of Claims under the general law.

In the case of the Richmond Locomotive Works the Acting Secretary of the Navy, Honorable William McAdoo, Dec. 20, 1895, reported to Congress "the erection of the machinery on board the vessel was commenced, the contractors were seriously delayed and hindered in their work by the non-delivery of the armor and other hull material, and by the consequent failure of the Department to have the hull far enough advanced

to enable them to carry on their work systematically and with proper economy, or to make the required horse-power trial of the machinery when the same was eventually completed. From a consideration of all the circumstances of delay and hindrance to which the contractors were subjected in carrying out this work, and in view of the progress made by them under the disadvantages and obstacles they encountered, I am convinced that, had they not been unreasonably hindered by the circumstances above referred to, they would have completed the construction, erection, fitting and connection in place of the machinery, and would have had it ready for the horse-power trial, as required by their contract and the specifications thereto attached, within the time limited by the contract as extended on account of the fire at their works, or by July 30, 1903." (House Doc. No. 92, 54th Cong., 1st Sess.; reprinted as part House Report 60, 55th Cong., 2d Sess.)

The Secretary recommended an appropriation be made to cover the direct damage, interest on the money withheld, dock trial, etc., and stated that the contractors were justly and equitably entitled to this amount. (See HouseReport 60, 55th Cong., 2d Sess.). The contracts is printed in this report and shows the same form was used with all the contractors above referred to.

Congress by act approved May 7, 1889, appropriated the money in the following language:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Treasury be, and he is hereby,

directed to pay to the Richmond Locomotive and Machine Works the sum of sixty-nine thousand five hundred and fifty dollars and thirty-nine cents, out of any money in the Treasury not otherwise appropriated, in full of its claim for damages and losses incurred in the construction of the armored battleship Texas." (Stat., p.).

In the case of the N. F. Palmer, Jr., & Co., by reference to Senate Report 118, 58th Cong., 2d Sess., it will be seen that the Secretaryof the Navy, Honorable W. H. Moody, recommended in a letter dated January 10, 1903, that the sum of $63,620.59 be paid to the Palmer Company for its losses and damages in building the machinery for the battleship Texas.

The Bureau officers reported to the Secretary, so he states, as follows:

> "We are of the opinion that the claimants are justly entitled to some compensation, and that the amounts should be allowed on the following points:
> (1) Interest on reservations of contract payments for the time delayed through fault of the Government.
> (2) Expenses of dock trial over and above any expenses of such dock trial as is usual and necessary for every contractor to make at his own expense under the fullfilment of his contract.
> (3) Expenses of care and preservation of machinery during the time its acceptance was delayed through fault of the Government.
> (4) Additional cost of insurance and bond required by the contract for the same period.

"It does not appear from these papers but can be determined from the records of the Department whether the usual insurance on the machinery installed in the ship was maintained during the period of delay; but, if so, its expense is a just claim. The bureaus are of the opinion that the contract requires insurance to be maintained on the trial trip and, therefore, the claim should not be allowed.

(5) The performance of a large and special contract of this nature causes any contractor a large increase in general expense by the maintenance of an extra office force of clerks and draftsmen, experts, foremen, and superintendents of labor, and the claimants are justly entitled to recover for such part of this force as it was necessary to maintain during the period of delay caused by the Government.

"Undoubtedly the best methods of settling the amounts due the contractors on those several grounds would be to refer the case to the Court of Claims where they can be thoroughly and carefully determined, as recommended by the Department in its letter of December 8, 1896; but as such a long time has elapsed already since the contractors were justly entitled to compensation, the bureaus are of the opinion that a definite recommendation should be made to enable the Department and Congress to act without the delay and expense to both parties to the case, which would be further incurred by reference to the court."

The Secretary states that when the machinery was accepted the contractors executed the usual release provided for by the contract, but appended to it the following: "This release is given by us with the understanding

that we are not precluded thereby from presenting our claim on account of delays caused by the Government, and for the expenses incurred in the care and preservation of the machinery during such delays."

The Secretary also says, "The claimants are now barred by the Statute of Limitations from prosecuting the claims before the Court of Claims." The Secretary concludes his letter to Congress by saying: "The Department concurs in the views of the bureaus, and approves the statement made by them of the amount to which said company is entitled on account of the matters set forth." The Secretary also states in his letter that the cause of the delays on the part of the Goverment in the building of the vessels was mainly caused by the inability of the Department to get the armor. The result was that when the contractors for the machinery were ready for the delivery and installation the vessel were not far enough advanced to receive said machinery, but the contractors were subject to expenses and losses by reason of the unreadiness on the part of the Government."

Congress appropriated the amount recommended by Secretary Moody to be paid by the following act:

> *Be it enacted by the Senate and House of Representatives of the United Sates of America in Congress Assembled,* That the Secretary of the Treasury be, and he is hereby, directed to pay to N. F. Palmer, Junior, & Company the sum of sixty-three thousand six hundred and twenty dollars and fifty-nine cents, out of any money in the Treasury not other-

wise appropriated, in full of their claim for damages and losses incurred in the construction of the armored cruiser Maine, that being the amount recommended to be paid by the Secretary of the Navy.

The third contracting party who suffered by these delays on the part of the Government in the delivery of armor was the Pneumatic Gun Carriage Company. The court thoroughly considered this case and gave judgment in favor of the company for its damages and losses.

The sole remaining claim against the Government growing out of the failure of the Navy Department to deliver the armor is that of the case of the Cramp Shipbuilding Company, now pending before the Court of Claims. The letters of the Secretary of the Navy referred to herein contains the statement that there were extensions of contracts in both the Richmond Locomotive Works and the N. F. Palmer Company's case. It was also proved in the Court of Claims in the Pneumatic Gun Carriage case that extensions of contracts were given to it.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 263.

UNITED STATES, APPELLANT,

vs.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING CO., APPELLEES.

No. 264.

THE WILLIAM CRAMP AND SONS SHIP AND ENGINE BUILDING CO., APPELLANTS,

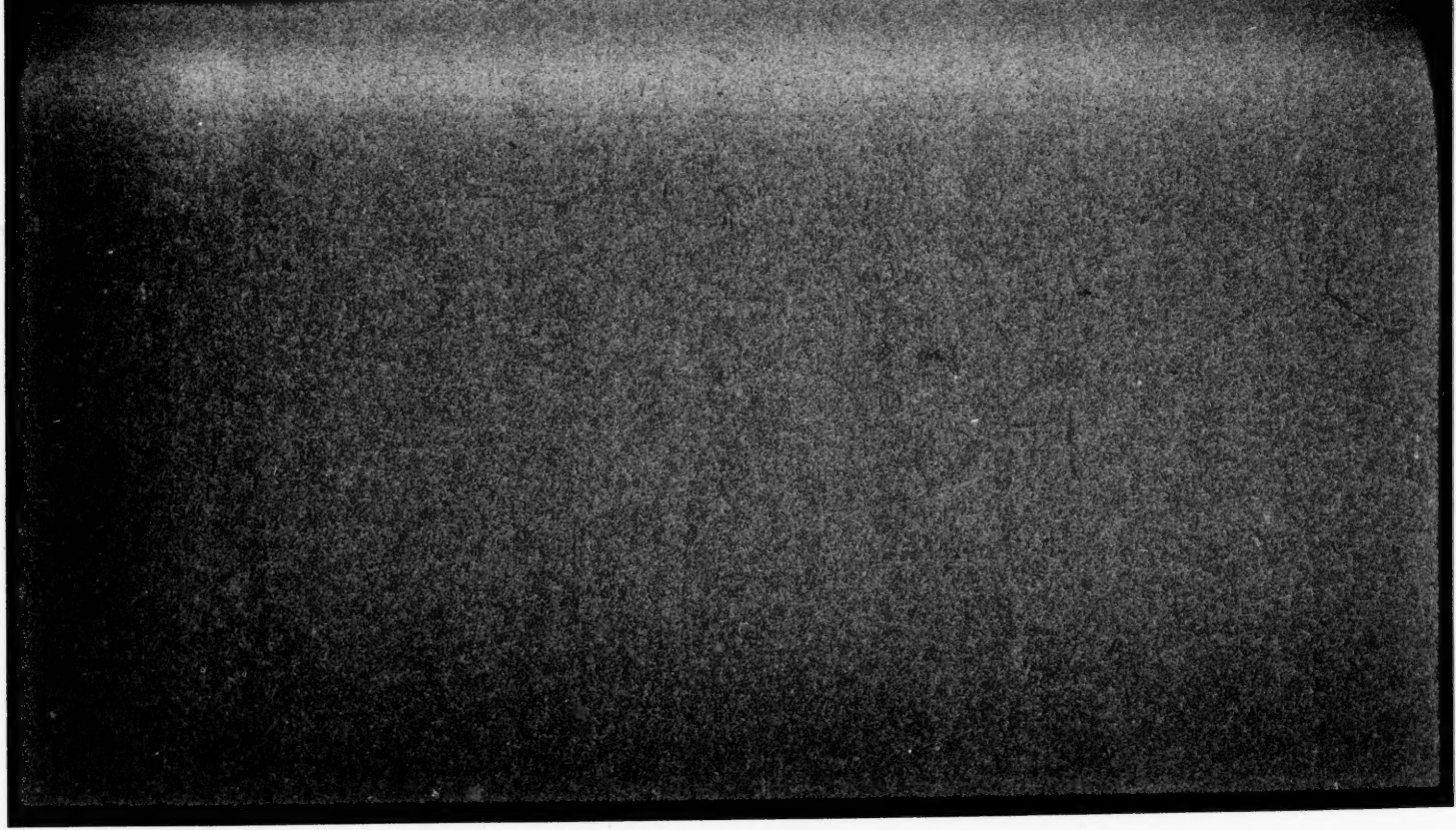
vs.

UNITED STATES, APPELLEE.

ADDITIONAL BRIEF FOR CRAMP AND SONS CO.

HOLMES CONRAD,
Of Counsel for the Cramp and Sons Company.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 26170



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Additional Brief for Cramp and Sons Co.

A brief synopsis of the material facts of these causes as they appear in the record may aid to a clearer understanding of the grounds relied on in these appeals.

(1) By the contract between the parties (Record, pp. 5–16), it was agreed:

(*a*) That the Cramp Company should build a war vessel for the United States according to certain plans and specifications, and complete and deliver the same "on or before the expiration of three years from the date of this contract" (p. 9).

(*b*) That the contract price for the vessel should be $3,020,000; that the "payments shall be made by the United States in thirty equal installments, as the work progresses, with a reservation of ten per cent. from each installment;" that the payment of the last three installments shall not be made except as provided for in the eleventh clause of the contract (Record, p. 15); that the eleventh clause of the contract provided that if upon the trial trip it was found that the Cramp Company had fulfilled the contract on its part, and the vessel made 15 knots an hour, then the vessel should be "preliminarily accepted" and "payment of the last three installments of the contract price of the vessel, and of all reservations shall be made, subject, however, to a special reserve of $60,000 from and out of the reservation hereinafter provided for," but if the speed of the vessel shall fall below 15 knots an hour, "she shall be conditionally accepted, subject to deductions, as aforesaid, from the contract price of the vessel," provided all the requirements of the contract have been fulfilled by the Cramp Company (Record, pp. 11–12).

(*c*) When all the requirements of the contract have been performed and fulfilled by the Cramp Company it shall be entitled to receive all the reservations from the contract then remaining unpaid "on the execution of a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of this contract."

(*d*) "In case the completion of the vessel, her machinery, fittings, and equipment, and the fitting, fixing, placing, and

securing of her armor, as aforesaid, shall be delayed beyond the period of three years, deductions shall be made from the contract price of the vessel for each and every day, during the continuance of such delay," &c. These deductions vary from $75 to $200 per day, and were to be made from any payments falling due under the contract (Record; p. 9).

(*c*) The third clause of the contract provides in substance that the Cramp Company shall furnish within ten months all working drawings and models showing the dimensions and shape of each piece of armor plate, "It being expressly understood and agreed that the party of the first part (Cramp Company) shall furnish armor, armor bolts and their accessories, and all the labor and material required in the constructive deck; that the party of the second part (United States) shall furnish all other armor, armor bolts and their accessories to be used in the construction of the vessel, including such as may be required in the construction of the belt, turrets, redoubts, barbettes, conning tower, gun shields, ammunition tubes, and in the protection of the guns and loading positions, trim such armor plates to the drawing or template (model) sizes and shapes within reasonable manufacturing limits, as set forth in the specifications, and drill and tap all necessary holes therein, as shown by said approved drawings and templates, *and deliver said* armor, armor bolts and their accessories, in such reasonable place or places in the shipyard of the party of the first part, as may be designated by the party of the first part, *and within the times and in the order required to carry on the work properly*, and that the party of the first part shall, at his own risk and expense, properly fit, fix, place and secure all the armor to the vessel, including the belt, turrets, redoubts and barbettes, conning tower, gun shields, ammunition tubes, and protection of the guns and loading positions, and furnish all other materials and labor required in the construction of the said vessel and her machinery, fittings, and equipments, as called for by the aforesaid drawings, plans and

specifications; provided, however, and it is expressly understood, covenanted and agreed, that if, upon the completion of said vessel, including hull, fittings, machinery, engines, boilers and appurtenances, and equipment, and all other work required under this contract, except the fitting, fixing, placing and securing of the armor for her side belt, casemate, turrets, redoubts, barbettes, and conning tower, the party of the second part *shall not have commenced the delivery* of such armor to the party of the first part, then and in such case the vessel shall be subjected to the trial trip provided for in the tenth clause of this contract, and if, at and upon such trial, all the conditions, and requirements relating thereto, except the fitting, fixing, placing and securing of the armor for the side belt, casemate, turrets, redoubts, barbettes and conning tower, shall be fulfilled, the vessel shall be accepted as provided for in the eleventh clause of this contract; and if the party of the second part *shall not have commenced the delivery* of the armor for the side belt, casemate, turrets, redoubts, or conning tower when the vessel is ready for her final trial, or within five months after either a preliminary or a conditional acceptance of the vessel, said vessel shall be finally accepted, and the cost of fitting, fixing, placing and securing the armor for the side belt, casemate, turrets, redoubts, barbettes and conning tower shall be ascertained, estimated and determined by a board of naval officers appointed by the Secretary of the Navy, the party of the first part shall be bound by the determination of said board, and such cost shall be deducted from the contract price of the vessel in the final settlement under this contract; but if the party of the second part *shall commence and continue with reasonable diligence the delivery of the armor* for the side belt, casemate, turrets, redoubts, barbettes, or conning tower of said vessel prior to her final trial, or within five months after either a preliminary or conditional acceptance of the vessel, the party of the first part shall fit, fix, place and secure all the armor to the vessel in accordance with

the requirements of this contract, and the drawings, plans, and specifications hereto annexed."

(All italics in the clause quoted are mine.)

(*f*) "All delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department, or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the vessel within the time specified therefor in this contract, shall entitle the party of the first part to a corresponding extension of the period herein prescribed for the completion of the vessel," &c. (Record, p. 10).

(2) The Court of Claims found as facts in this case the following, among others, viz:

> "Immediately after the making of the contract the claimant arranged and systemized a working programme for the construction of the vessel, by organizing its working force so as to coöperate with each other in harmony on coördinate work, and to secure economy in the construction of the vessel within the contract time, and to escape the penalties imposed thereby for delays. The claimant would have completed the vessel within the contract period, if it had not been for the failure of the United States to furnish materials within the time and in the order to properly carry on the work, which by the terms of the contract they had agreed to furnish. By reason of the failure of the defendants to furnish the materials, which, by the third clause of the contract, they had agreed to furnish, within the time and in the order as aforesaid, the completion of the vessel was delayed for two years beyond the contract period" (Record, p. 18).

The Court of Claims found (Finding V, Record, p. 19) that the cause why there was no preliminary or conditional acceptance of the vessel was "owing to the failure of the de-

fendant to furnish, in the order required, the material which they had agreed to furnish."

The court found that the vessel was completed and delivered on November 19, 1895 (Finding IV, p. 19), and was finally accepted by the United States on May 18, 1896.

ON THE CASE AS PRESENTED BY THE RECORD, THE CLAIMANTS HAD EARNED, AND WERE ENTITLED TO DEMAND AND RECEIVE, THE FULL CONTRACT PRICE OF THE VESSEL, LESS THE COST OF FITTING THE ARMOR, ON NOVEMBER 19, 1893.

The findings of fact by the Court of Claims show that claimants would have completed the vessel according to the contract by November 19, 1893, if they had not been crippled by the failure of the Government to furnish the material it had agreed to deliver. Claimants, then, had fulfilled the requirements of the contract on their part. All that the third clause of the contract imposed upon claimants had been done by them before the expiration of the contract period. In confirmation of this the United States had paid to claimants twenty-seven of the thirty equal installments of the contract price.

On November 19, 1893, at the expiration of the contract period, the United States had in its hands, of the claimants' money, so earned by them—

Ten per cent. of 27 installments of the contract price	$275,670 00
The three last installments of the contract price	306,300 00
	$581,970 00

These sums had been reserved by the Government as a security to it for the faithful performance by claimants of the contract on their part. It is found as a fact that claimants

had faithfully performed the contract on their part, and the contract, by its own limitation, expired on November 19, 1893. The United States were in default. They had broken the contract on their part, and on November 19, 1893, right of action accrued to claimants against the United States for such damages as claimants had sustained by the breach. Certainly no right remained and continued in the United States to withhold longer the money which had been earned by claimant and was reserved by the United States, as claimants' money, to secure the United States against loss by reason of claimants' breach. That contingency had passed and had now become impossible.

In Amoskeag Man. Co. *vs.* United States, 17 Wall., 592, the Government contracted with the company to make and deliver 6,000 carbines of a certain structure within six months from April 15, 1863. The contractors would have performed the contract but for delays caused by the Government. On April 5, 1864, the carbines were ready and were tendered and refused. In March, 1870, they were still in the hands of the contractors. The Company sued in the Court of Claims, and that court dismissed its petition. On appeal, this court reversed that judgment, saying, through Mr. Justice Miller:

> "But this is a narrow and incomplete view of the contract. It leaves out the claimant's rights in the matter. The claimant had a right, under the original contract, to deliver 6,000 carbines in six months, and have his pay, if he could make so many in that time. He could have made them all within that time, as found by the court, but for his consent to the request of the Government, to change, for its benefit, the structure of the weapon. As before stated, this request implied such an extension of time as was known to be necessitated by that improvement, and the Government must be bound by this reasonable intendment, as an individual would have been. As it is found, substantially, that the claimant was ready and offered to deliver within a reasonable time, he is

> entitled to recover such damages as he sustained by the refusal of the Government to receive and pay for the arms."

So the rule of damages recognized and enforced by this court in the case of United States *vs.* Behan, 110 U. S., 338, is applicable here, in seeking to determine damages sustained by these claimants by reason of the breach of contract by the Government. But it should be noticed here that profits earned, or which might have been earned, by these claimants form no part at all in the amount for which they seek judgment against the United States. They ask only for money actually earned by them and reserved by the Government, and for money actually paid out by them as a direct and necessary consequence of the two years' delay in completing the vessel to which they were subjected by the default of the Government.

It appears from the record (page 23) that they were subjected to actual, additional expenditures by reason of the two years' delay of..... $177,823 55
And to preparation of the trial trip, which was not made 17,514 94

THE AMOUNT OF $177,823.55, ACTUALLY PAID OUT BY CLAIMANTS IN MAINTAINING THEIR WORK DURING THE TWO YEARS BEYOND THE CONTRACT PERIOD, SHOULD BE REPAID TO THEM.

The Court of Claims recognized their right to be reimbursed this amount, but it allowed them only $135,560 of that amount and disallowed them $42,263.55, the balance of that amount, the court in its opinion saying (Record, p. 35): "We are not free from doubt on this branch of the case." The ground on which the court disallowed a part of these expenditures was that claimants had released the United States from so much of the entire amount as had been expended prior to May 10, 1894.

What was this release, and how was it obtained from claimants?

Finding of Fact No. V, on page 19 of the record, states the conclusion of the Court of Claims. The instrument of release appears on page 16 of the record. In its physical features it lacks nothing of due solemnity, save that while it speaks of "hands and seals," it is in fact an unsealed instrument, as appears by the absence of seals, which are prominent enough in the contract which this instrument purports to amend. It is dated on May 10, 1894, just six months after the contract which this claims to amend had expired by its own limitation and after and during the continued breach of that original contract by the United States. The consideration for this release is recited to be the payment to the claimants by the United States of "so much of the aggregate amounts of the last three installments of the contract price, and of the amount of the reservations from previous payments, as will leave in the hands of the party of the second part an amount sufficient, in the judgment of the Secretary of the Navy, to cover the special reserve of sixty thousand dollars provided for in the eleventh clause of the contract, the cost of all unfinished work, and all deductions likely to be made on account of deficiencies in speed, and all contingencies that are likely to arise."

So here is at least an admission by the Secretary of the Navy that on May 10, 1894, six months after the date of the expiration of the contract, the sum of $60,000 was enough to reserve to secure the Government against all possible contingencies of loss on account of the claimants.

Of course, the amount to be paid was very large, and had been held back by the Government for a long time, and, as we have tried to show, held back wrongfully and in disregard of the rights of the claimants. But claimants were in great straits; they had to have this money to keep themselves afloat; and so they did sign this instrument, and we are not permitted to say that they did not know what they

were doing when they signed. They signed it to release their money from the detention of the United States, or at least of the Secretary of the Navy.

In the case of United States *vs.* Cuba Mail S. S. Co., 200 U. S., 408, this court said:

> "Where a party pays an illegal demand, with full knowledge of the facts which render it illegal, without an immediate or urgent necessity therefor, or unless to release his person or property from detention, or to prevent an immediate seizure of his person or property, such payment must be deemed voluntary and cannot be recovered back."

And to the same effect are Swift Co. *vs.* United States, 110 U. S., 23; Roberts *vs.* Frank Brothers, 132 U. S., 22; Railroad Co. *vs.* Commissioners, 99 U. S., 541, and Little *vs.* Bowers, 134 U. S., 547.

But, alluring as the bait held out to these claimants appeared to be, what were its real substance and value? After stating the consideration, there follows a proviso, which is that the claimants shall first give bond, with approved security, conditioned to pay back the money so paid to them, "on demand being made by the Secretary of the Navy therefor, for indemnity of the party of the second part of the amount so paid."

That is, if the claimants will execute a solemn release of the United States from all claims for damages by reason of any failure on the part of the United States to comply with its contract, then they will let the claimants receive this money, provided that they pay it back immediately or at any time that the Secretary may demand it from them.

One competent to contract may release another from all liability to him on claim for damages, but to support such release there must be a valid consideration. The payment by the debtor to the creditor of the amount of his debt before the same is due may be a valid consideration, but if the

debt is due and payment is withheld by the debtor until the creditor execute a release of other claims, that is not a valid consideration.

Here the United States withheld from the claimants "reservations" amounting to $581,970 solely as a security to indemnify the Government against loss by reason of the failure of the claimants to fulfill the contract on their part. It is clearly admitted on the part of the United States, in the "amended contract" of May 10, 1894, that on that date at least the sum of $60,000 was sufficient to afford the indemnity required, and the residue was then paid over to claimants. This of itself is all that is needed to show that the Government had no right to retain in its hands more than that amount.

But, looking to the terms of the "release," we submit that they do not embrace the items of the demand here made by claimants. The demand here is not for *damages*. The items of the demand appear on page 23 of the record. They are for amounts of money actually paid out by claimants, at the implied request of the United States, after the expiration of the contract period and during the two years in which the claimants were engaged in receiving and placing the long-delayed armor, as it was delivered by the United States.

After the expiration of the contract claimants might have declined to continue the work, and have relied on their claim against the United States for their breach of the contract; but, in the interest of the United States and for their benefit alone, and impliedly at their request, claimants did continue and completed the vessel. These items of expense were incurred under those conditions, and the Court of Claims has found as a fact that they were rightfully incurred, and abated the amount in part only because of the alleged release of such part by claimants.

THE EXPENDITURE OF $17,514.94 BY CLAIMANTS IN PREPARATION FOR THE TRIAL TRIP PROVIDED FOR IN THE THIRD CLAUSE OF THE CONTRACT SHOULD HAVE BEEN ALLOWED.

The Court of Claims (Record, p. 23) say:

> "If the claimant is entitled to recover the expense so incurred in the preparation for the preliminary trial of the vessel, the amount, as verified by the officers of the Navy, and which we find reasonable, was $17,514.94."

By the third clause of the contract (quoted in full above) it is provided (near bottom of page 7 of Record) that upon the completion of the vessel by contractors, except as to the fitting of the armor, if the United States shall "not have commenced the delivery of such armor to the party of the first part, then, and in such case, the vessel *shall be* subjected to the trial provided for in the tenth clause of this contract," &c.

On March 23, 1894, the contractors notified the Secretary of the Navy that the vessel would be ready for its trial trip "between May 1 and 10 following."

The Secretary appointed a board of officers to inquire into the matter.

That board reported that the vessel would not be ready for the official trial trip, in accordance with the tenth article of the contract, by May 1, 1894, and that such trial trip should not, in the interest of the Government, take place until the vessel was fully completed and ready for delivery" (Record, p. 23).

Now note: Claimants had not reported that the vessel would be ready for the trial trip *by May 1*, 1894, but that it would be ready for such trip *between May 1 and May 10*, and the board of officers do not contradict this statement. They were content to report that it would not be ready by

May 1. Contractors had not proposed "an official trial trip in accordance with the tenth article of the contract," but they had proposed a trial trip in accordance with the third article of the contract, and no reason is given in the report of the board of officers why such trial trip was not allowed. The board of officers report that "such trial should not, in the interest of the Government, take place until the vessel was fully completed and ready for delivery." An official trial trip, under the tenth article of the contract, could not take place until then; but that was not the trial trip that was requested.

That a trial trip under the third clause of the contract was contemplated by the Secretary of the Navy more than one month before the board of officers was appointed to "inquire into the matter" is evident from the letter of the Secretary to the contractors, of March 9, 1894 (Record, p. 22), in which he says:

> "In view of the fact that the trial trip of the *Indiana* will take place at an early date, and as you are probably now making preparations therefor, your attention is invited to the tenth clause of the contract for the construction of that vessel, which provides that the expense of a successful trial of the vessel shall be borne by the Government."

Another board of officers was appointed to "inform themselves as to what expenses you incur in preparing the vessel for trial." This board reported, and no objection was found to the amount of the expenses (Record, p. 22). So it is manifest that the proposed trial trip was well known to the Secretary long before the date fixed upon by the contractors, viz., between May 1 and May 10. Not only did he know it to be a "fact that the trial trip of the *Indiana* will take place at an early date," but he also knew exactly, from the report of his own board, the amount of the expenses incurred by

the contractors in the preparation for such trip, and no objection was found to the amount of such expenses.

On what ground, then, is it proposed to cast upon the contractors the burden of the expenses incurred by them in preparation for this trial trip? In his letter of March 9, 1894, written to the contractors, as the letter itself states:

> "In view of the *fact* that the trial of the *Indiana will take place at an early* date, and, as *you are probably now making preparation therefor,* your attention is invited to the tenth clause of the contract for the construction of the vessel, which provides that the expense of a successful trial of the vessel shall be borne by the Government," &c.

Exactly two weeks after the date of that letter, the contractors write to the Secretary and advise him that they will "offer the vessel for an official trip between May 1 and 10 following."

Here the Secretary recognizes as a "fact" that the trial trip will take place, and that the Government shall bear the expense of a successful trial. He knows, of course, that preparation must be made by the contractors for such trip, and that they must incur great expense in such preparation. He does not warn them not to make such preparation, not to incur such expense; that the time for a trial trip has passed; that no trial trip of the vessel will be allowed until she is fully armored. He gives no warning, but rather by his letter gives encouragement to them to proceed, and actually sends a board of officers to the contractors to ascertain the amount of the expenses of preparation already incurred by them. That board reports the amount, and no exception is taken to it. But, more than a month after the date of his letter to the contractors, he appoints, on April 12, 1894, another board, who reported that the vessel could not be ready for the trial trip on the first of May, and that such trip should not "in the interest of the Government take place

until the vessel was fully completed and ready for delivery." This board did not report that the vessel would not be ready for the trial "between the first and the tenth of May," the period fixed by the contractor. When that board made its report the probability is that all the expenses of the preparation for the trial trip had already been incurred by the contractor. Why did the Secretary allow this expenditure, when all the facts were within his knowledge? Why did he not appoint his board to "inquire into the matter" on March 9, when he wrote his letter to the contractors; or on March 20, when the contractors notified him when they would be ready for trial? Can it be possible that the Secretary, well knowing—as he subsequently announced—that the Government was in default, and that such default had subjected these contractors to enormous expense, for which the Government would have to account; and believing further that the trial trip, between the first and tenth of May, would prove successful, and that then he would be compelled, under the eleventh clause of the contract, to allow the vessel to be "preliminarily accepted, and payment of the last three installments of the contract price of the vessel and all reservations to be made" except the further reservation of $60,900? Can it be that this was the real reason why, "in the interest of the Government," the trial trip should not take place until the vessel was fully completed and ready for delivery?

The conclusion cannot be evaded that had the trial trip taken place between the first and tenth of May it would have proven successful. The Court of Claims by its findings substantially shows that it has found that the contractors were at no time in default; that the vessel would have been completed within the contract period if the Government had fulfilled its part. The contractors had fully performed all that lay upon them to do. Surely, then, the Government can find no support, from the law or the facts, for its contention that the burden of this expense of $17,514.94, which the Court of Claims finds was a reasonable

amount for the preparation (Record, p. 23), should be shifted from the shoulders of the Government and cast upon the claimants because the Secretary of the Navy did arbitrarily, and regardless of the rights of the claimants, refuse to allow the trial trip to take place.

If, as we insist, the word "commenced" shall be construed as though it was followed here, as it is on the next page, in the closing part of the same clause, by the words "and continued with reasonable diligence"—a construction admitted by counsel for the Government on page 27-28 of his original brief—then it must be allowed that a *right had accrued to these claimants* to have such trial trip and to have credited to them all the benefits that would have resulted therefrom.

THE RIGHTS OF CLAIMANTS, DEFINED AND SECURED BY THE CONTRACT WITH THE UNITED STATES, COULD NOT BE IMPAIRED OR DESTROYED BY ANY ACT OF THE SECRETARY OF THE NAVY NOT AUTHORIZED BY THE CONTRACT OR BY LAW.

The third clause of the contract has been quoted in full because by it the rights and obligations of the parties to the contract are prescribed and defined. It states explicitly what each of the parties is required by the contract to do and the order in which they are to do them.

It prescribes that the United States shall deliver at the shipyard of the claimants certain designated armor for the vessel, and that such armor shall be so delivered "within the times and in the order required to carry on the work properly." Six times is that armor specified, piece by piece, in this third clause of the contract, and each time it is specified in exactly the same order, viz., "side belt, casemate, turrets, redoubts, barbettes, and conning tower;" and this was so carefully observed that there might be no question as to the order in which the armor would be needed and must be delivered. The necessity for this is obvious. The armor must be put on in the order in which it was practicable, and not

as the convenience or caprice of the parties might suggest. The side belt extended along the sides of the vessel, being three feet above and four feet six inches below the normal water line. It was of iron or steel, was eighteen inches thick, and weighed many tons. This had to be put on first of all, before the vessel was loaded down with other matter and while its normal water line was apparent. It should have been fully delivered before November 19, 1893, and yet it is a fact found by the Court of Claims (Record, p. 19) that the United States did not commence to deliver this armor until August 13, 1894, and did not complete the delivery until August 6, 1895.

It is urged rather strenuously in the reply brief of the Attorney General that the contract only required the Government to "commence the delivery" of this armor, and the duty of the Government under this contract was fulfilled by the delivery of a bolt or a pin in the name of the whole. But the first impressions of the writer of the briefs were the best, for in the principal brief for the United States, on page 27, it is said:

> "Moreover, the contractor would obviously have the same right if the Government, having once begun to deliver the armor, should not continue the delivery with reasonable diligence, for it cannot have been intended that merely beginning to deliver the armor, without more, would meet the requirement of this provision."

And indeed in the very third clause, lower down (on page 8), there appears this phrase: "but if the party of the second part shall commence and continue with reasonable diligence the delivery of the armor for the side belt, casemates, redoubts, barbettes, or conning tower of said vessel," &c.; and so, we assume, will the expression be construed elsewhere in the contract.

The Secretary of the Navy could not impose or increase the claimants' liabilities by extending the time for the completion of the vessel.

The ninth clause of the contract provided (Record, p. 10):

> "All delays which the Secretary of the Navy shall find to be properly attributable to the Navy Department, or to its authorized officers or agents, or any or either of them, and to have been a delay operating upon the final completion of the vessel, within the time specified therefor in this contract, shall entitle the party of the first part to a corresponding extension of the period herein prescribed for the completion of the vessel,"

with a proviso, however, that this can be done only on the application of the contractor.

The author of the principal brief for the United States says on page 31, as to this feature of the contract:

> "In short, there is nothing else that this provision for an extension of time can mean than just this, that the extension changes the date for the completion of the vessel, *and wipes out all liability for delays before the date was changed.*"

That is, in a contract by which the Government binds itself to deliver material within a certain time and in a certain order, and fails altogether to do so, and thereby imposes heavy expenses upon the other party to the contract, the Government can wipe out its liability by merely extending the time for the completion of the work; and that it can do this even more than two years after the expiration of the contract period, and after it alone has been in default, and after the vessel has been actually completed and delivered.

Now, as matter of fact, and indeed of law, as this court held in the Amoskeag Co. case, in 17 Wallace, 592, where the delay was caused by the Government, no provision of law and no authority from the Government was needed to

give to the contractor a corresponding extension of time. He had it, if he wished it, by operation of law; and the extension by the Secretary, as it appears in the Finding IV (Record, p. 19), was wholly unnecessary and of no effect. The claimants had asked for no extension of time. They were not in default. They had fully complied with all the requirements of the contract as to them. They had incurred no penalties or forfeitures and were under no liabilities, under the contract, after November 19, 1893.

What, then, is the explanation of this contract on the part of the Secretary of the Navy in 1894? Do not the facts of history warrant the suggestion that the only reason why these claimants were not paid in full the money that was due to them was that the United States did not at that time have the money in the Treasury and was unwilling openly to repudiate its debts, but preferred to employ these small devices to put off the insistent creditor. The Treasury was empty and the Government had to borrow money on its bonds, and on no other reasonable hypothesis can the course pursued toward this creditor be explained.

HOLMES CONRAD,
Of Counsel for the Cramp and Sons Company.